Order

Michigan Supreme Court
Lansing, Michigan

January 14, 2022

Bridget M. McCormack,
Chief Justice

163490

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 163490
COA: 352908
Saginaw CC: 10-033976-FC

RONALD EDWARD OWENS, JR.,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the July 8, 2021 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CLEMENT, J. (*concurring*).

While I have some doubts about the rationale the Court of Appeals relied on in reaching the result it did, I believe it reached the correct result and that the fundamental problem is that our court rules are not well adapted to deal with the problem this case presents. As a result, rather than hear the case with an eye toward affirming under a modified rationale, I concur with our order denying leave to appeal, but I support the Court's exploring an appropriate change to the court rules to address this problem.

At trial, defendant was convicted of assault with intent to do great bodily harm (AWIGBH), conspiracy to commit AWIGBH, incitement of perjury, and witness intimidation. His direct appeal and initial motion for relief from judgment under MCR 6.500 were both unsuccessful. However, in 2019 the United States District Court for the Eastern District of Michigan ruled that his convictions of AWIGBH and conspiracy to commit AWIGBH were not supported by sufficient evidence and ordered that they be vacated. See *Owens v Campbell*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued September 30, 2019 (Case No. 15-cv-13264). While this left intact defendant's convictions for incitement of perjury and witness intimidation, the sentences he received for those remaining convictions were informed by points that were assessed against him for the convictions that have since been set aside. Defendant filed a motion for relief from judgment, seeking to be resentenced on his remaining convictions. To get relief, however, he needed to overcome the general rule that

criminal defendants may file only one such motion, MCR 6.502(G)(1), given that he had already filed an unsuccessful motion.

While ordinarily a defendant may file only one motion for relief from judgment, there are a few exceptions. "A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment was filed or a claim of new evidence that was not discovered before the first such motion was filed." MCR 6.502(G)(2). Also, "[t]he court may waive the provisions of this rule if it concludes that there is a significant possibility that the defendant is innocent of the crime." *Id*. Defendant argued that the federal court's decision qualified as "new evidence," which would allow him to file a successive motion. The trial court held that the federal court decision was not "new evidence," but allowed the motion anyway because it concluded that the federal court decision was a "retroactive change in law" and ordered that defendant be resentenced. The prosecution appealed this ruling in the Court of Appeals, which affirmed. *People v Owens*, ___ Mich App ___ (2021) (Docket No. 352908). The Court concluded that the trial court had erred by construing the federal court decision as a "retroactive change in law," but affirmed anyway on the basis that defendant's initial argument was correct—that the federal court decision qualified as "new evidence." The prosecution now appeals in our Court, challenging this ruling.

I think there is substantial reason to question whether the federal court's decision qualifies as either a "retroactive change in law" or as "new evidence" under MCR 6.502(G)(2). I believe the Court of Appeals was correct to observe that our decision in *People v Barnes*, 502 Mich 265 (2018), makes clear that the sort of "change in law" that is contemplated by the rule is the establishment of new generally applicable rules, not a case-specific legal ruling such as the federal court decision. But I also question the Court of Appeals' conclusion that the federal court decision is "new evidence." In *People v Cress*, 468 Mich 678, 692 (2003), we articulated a four-part test for receiving relief on claims of new evidence, which appears to me to indicate what is contemplated by "new evidence" under the rule. While we have held that a defendant need not satisfy the *Cress* test in order to clear the procedural threshold of MCR 6.502(G)(2), see *People v Swain*, 499 Mich 920 (2016), it appears to me that proposed "new evidence" would at least need to be information that is capable of satisfying the *Cress* test to qualify as "new evidence." Since one prong of the *Cress* test is that the proposed new evidence "makes a different result probable on retrial," the federal court decision is seemingly not useful under the *Cress* test, which suggests it is not "new evidence" that is contemplated by MCR 6.502(G)(2). One also might argue that the federal court decision constitutes "a significant possibility that the defendant is innocent of the crime," although this also seems highly debatable. Defendant seeks resentencing on two convictions; these would seem to be "the crime" contemplated by the rule, and he does not allege he is innocent.

In short, it seems to me that the Court of Appeals tried to put a square peg into a round hole by trying to construe MCR 6.502(G)(2) to extend to this situation. That said, the inclination to grant relief was sound. We have said that it is a "fundamental due process requirement that a sentence must be based on accurate information . . . ." *People v Eason*, 435 Mich 228, 233 (1990). It seems indisputable that, because defendant's sentence was informed by the existence of convictions that have since been legally nullified, his sentence can no longer be said to "be based on accurate information." The basic problem here is that our court rules do not contemplate this set of circumstances, yet relief is undoubtedly warranted. I agree with the Court's decision to deny leave here because I do not believe we have anything productive to add under the current language of the court rules, but I support reviewing the rules to see whether there are appropriate changes we can make that would more clearly address this situation.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 14, 2022

Clerk

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